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In the Supreme Court of the United States

OCTOBER TERM, 1985

CROUNSE CORPORATION, ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Section 11321 of the Interstate Commerce Act, 49 U.S.C. § 11321 (originally enacted as section 11 of the Panama Canal Act of 1912 and referenced hereinafter as the "Act") prohibits a railroad from acquiring any interest in a water carrier with which it does or may compete for traffic that moves on a water route served by the water carrier unless the railroad establishes that the acquisition will not reduce such competition. In this case the Interstate Commerce Commission ("ICC") has approved the acquisition of the nation's largest barge line by the nation's second largest railroad, although finding that they directly competed for traffic. The Court of Appeals sustained the ICC's approval, holding that the ICC was not required to analyze the acquisition's effect on rail-barge competition. The Court of Appeals also held that competition among barge carriers would not be reduced within the meaning of the Act unless barge lines would be completely driven from the water route. In this context, the questions presented are:

1. Whether the Court of Appeals erred by holding that under the Act, which precludes railroad acquisitions of competing water carriers unless competition will not be reduced, the ICC can ignore the impact on rail-barge competition in determining whether to approve the acquisition.

2. Whether the Court of Appeals erred by holding that under the Act a railroad acquisition of a competing water carrier does not reduce competition unless other water carriers will be driven completely out of the market.

PARTIES

The seventeen petitioners consist of shippers (Tampa Electric Company and Gatliff Coal Company); associations representing shippers (National Coal Association, The National Grange, and The National Association of Wheat Growers); water carriers (Crounse Corporation, The Ohio River Company, M/G Transport Services, Inc., Canal Barge Company, Inc., Dixie Carriers, Inc., The Valley Line Company, S.C. Loveland Company, Inc., SCNO Barge Lines, Inc., and TECO Transport & Trade Corporation); associations representing water carriers (The Water Transport Association, and The American Waterways Operators, Inc.); and the State of North Dakota.[1] These petitioners were either petitioners or intervenors urging reversal of the ICC's decision in the Court of Appeals.[2] The respondents and intervening parties urging affirmance of the ICC's decision in the Court of Appeals consisted of the ICC, the United States, CSX Corporation and American Commercial Lines, Inc.

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[1] Information concerning petitioners required by Rule 28.1 of the Rules of the Supreme Court is set forth in Appendix G to this petition, 219a. The appendix to this petition has been separately bound and filed in this Court.

[2] Other petitioners or intervenors below who urged reversal were PPG Industries, Inc., Interstate Power Co., Tennessee Valley Authority, Patrick W. Simmons (Illinois Legislative Director for United Transportation Union), the National Marine Service, Inc., and the Mining and Reclamation Council of America.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals majority (App. A, 1a-31a) and the dissenting opinion of Judge Timbers (App. A, 32a-41a) are officially reported at 781 F.2d 1176. The dissenting opinions of Judges Merritt and Jones from the denial of rehearing *en banc* (App. D, 44a-46a) are officially reported at 787 F.2d 1031. The decision of the Interstate Commerce Commission (App. E, 47a-210a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (App. B, 42a) was entered on January 23, 1986. A petition for rehearing with suggestion for rehearing *en banc* was denied in an order entered March 28, 1986 (App. C, 43a). This order was amended on April 11, 1986 to include a four-page dissent by Judge Merritt, joined by Judges Keith, Martin, and Jones, and a separate dissent by Judge Jones (App. D, 44a-46a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 11 of the Panama Canal Act of 1912, Ch. 390, § 11, 37 Stat. 566, currently codified at 49 U.S.C. § 11321 (1982), provides in pertinent part:[3]

> (a)(1) Notwithstanding sections 11343 and 11344 of this title, a carrier, or a person controlling, controlled by, or under common control with a rail, express, sleeping car, or pipeline carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may not own, operate, control, or have an interest in a water common carrier or vessel carrying property or passengers on a water route with which it does or may compete for traffic.
>
> * * * *

[3] In 1978 Congress restated and codified the entire Interstate Commerce Act without making any substantive change. Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3, 92 Stat. 1337, 1446. Prior to codification section 11 of the Panama Canal Act was located at 49 U.S.C. § 5(15)-(17) (1976). This provision is substantially the same as the text of the Act as originally adopted and contains the governing language and meaning of the statute as embodied in section 11321. *See* H.R. Rep. No. 1395, 95th Cong., 2d Sess. 4 (1978). The full text of the original Act as well as the Act before and after the 1978 codification is reproduced in Appendix F, 211a-218a.

(b) Notwithstanding subsection (a) of this section, the Commission may authorize a carrier providing transportation subject to the jurisdiction of the Commission under that subchapter to own, operate, control, or have an interest in a water common carrier or vessel that is not operated through the Panama Canal and with which the carrier does or may compete for traffic when the Commission finds that ownership, operation, control, or interest will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce and that it will still allow competition, without reduction, on the water route in question. . . .

STATEMENT

This case involves the acquisition of American Commercial Lines, Inc. ("ACL"), which owns the nation's largest barge line, by CSX Corporation ("CSX"), the nation's second largest railroad and the largest rail carrier east of the Mississippi.[4] The acquisition of ACL by CSX was a by-product of events involving a hostile tender offer in 1983 by Coastal Corp. to acquire the stock of Texas Gas Transmission Company ("Texas Gas"), a natural resources company which is the parent corporation of ACL. Texas Gas sought a so-called "white knight," and on June 9, 1983, CSX made a tender offer for the stock of Texas Gas as part of an agreement and plan of merger between CSX and Texas Gas which would result in CSX ownership and control of ACL.

Since CSX's acquisition of ACL required ICC approval and since no application for approval had been filed, CSX and Texas Gas agreed to place the ACL stock in a voting trust which was submitted to the ICC on June 10, 1983, and, after

[4] CSX is a railroad holding company resulting from the merger of the Chessie System Railroads, the Seaboard System Railroad, and the Richmond, Fredericksburg and Potomac Railroad. *CSX Corp.*, 363 I.C.C. 518 (1980).

modification, again on June 14, 1983. Litigation then ensued before the ICC and subsequently in the District Court and the Court of Appeals for the District of Columbia Circuit challenging the use of the voting trust device. *See Water Transport Association* v. *ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). The Court of Appeals, Judge Greene dissenting, sustained the ICC's use of the voting trust device without addressing the merits of the underlying acquisition.

On November 4, 1983, CSX applied to the ICC under the Panama Canal Act, 49 U.S.C. § 11321 (1982), for approval to acquire ACL. Numerous shippers, states, utilities, water carriers and labor organizations opposed the application.[5] Some shippers and states supported the application (App. A, 3a). Hearings were held before an administrative law judge, but he made no findings of fact and rendered no recommended decision.

The ICC approved CSX's acquisition of ACL on August 27, 1984. The approval marks the first time in the seventy-four year history of the Act that the ICC has approved the acquisition by a railroad of a competing water carrier. In approving the acquisition, the ICC overruled its longstanding interpretation of the Act and ignored the impact of the acquisition on rail-barge competition between CSX and ACL.[6]

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[5] (App. A, 3a). The acquisition was opposed by a broad spectrum of the shipping public, including the Tennessee Valley Authority, the United States Department of Agriculture, the states of West Virginia, Minnesota, Oklahoma, and North Dakota, the leading agricultural trade groups, shippers representing utilities, chemical manufacturers, firms engaged in the iron and steel business, and the bulk of the nation's coal producers through the Mining and Reclamation Council and The National Coal Association. (App. E, 66a-69a, 162a-164a).

[6] In approving the acquisition, the ICC purported to impose so-called "reporting and oversight conditions" which, according to the ICC, would permit it "to take corrective action, if necessary to deal with any anti-competitive effects" which might manifest themselves after the merger (App. E, 146a). There is no statutory authorization for the imposition of conditions

CSX and ACL are giants in their respective industries. The vast scope of their operations was aptly summarized in the dissenting opinion of Circuit Judge Timbers in the Sixth Circuit:

> CSX and its rail subsidiaries operate over 27,000 miles of track. CSX is the leading carrier of solid bulk commodities by any mode. In 1981, for example, CSX moved 541 million tons of traffic. This constituted one-half of all coal and chemical shipments and nearly one-third of all agricultural products shipped by rail in the eastern United States. Most importantly, CSX controls primary access to one-half of all the rail/barge coal-loading capacity on the Ohio River system, including *all* of the terminals along one important 300 mile stretch of the Ohio River. CSX and two other railroads account for 86% of *all* eastern Class I rail revenues. Revenues for 1982 totalled nearly $5 billion, with net income for that year amounting to $338,400,000.
>
> ACL operates its barge lines over 7,500 miles of the 15,000 miles of inland waterways. ACL is the nation's largest line-haul bargeline. ACL is one of the top three for-hire bargelines in the transport of coal, chemicals and agricultural products on the inland waterways. ACL and five other carriers transport 70% of *all* eastern coal shipments to utilities along water routes. ACL's revenues for 1982 totalled $295,000,000 with net income for that year amounting to $21,000,000.

(App. A, 33a-34a).

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in a Panama Canal Act case. Moreover, the notion that rail-barge ownership should be allowed, subject to ICC regulation, is an approach that was specifically rejected by Congress when the Bourne amendment was defeated in the course of passage of the Act. Instead, Congress deliberately chose to declare common ownership unlawful and adopted the broadly worded general prohibition contained in the Act. *See* 48 Cong. Rec. 10586 (1912); H.R. Rep. 1197, 62d Cong. 2d Sess. 6-7 (1912).

Prior to the acquisition, CSX and ACL competed directly for the transport of bulk commodities, including coal, grain, and liquid chemicals. CSX tracks intersect and parallel the waterways served by ACL, as shown in the map following page 25. As noted by Judge Timbers (App. A, 34a), CSX and ACL competed directly for customers in 12 states and 59 metropolitan areas (including Chicago, Cincinnati, Louisville, Memphis, Mobile, New Orleans and Pittsburgh). Thirty utility plants, including those operated by the Tennessee Valley Authority, have the capacity to be serviced by either CSX or ACL. These two carriers competed for shipments to and from 163 points along the inland waterway system and to and from points within a band extending from 25 to 200 miles on either side of the water route. As a result of the acquisition, all head-to-head, or horizontal, competition between CSX and ACL has been eliminated.

The acquisition also reduced competition for traffic moving in part by rail and in part by water. Even the ICC conceded that CSX has the "interest and ability" to divert to ACL, and away from independent water carriers, traffic it delivers to the river for onward water movement (App. E, 117a). And, as Judge Merritt observed in his dissent from the denial of rehearing *en banc*:

> [CSX] controls 50% of the barge terminals on the river system in question, and all of the terminals on large stretches thereof. If, after buying [ACL] the railroad restricts the use of its terminals to [ACL], it will eliminate competition among barge lines that haul coal and other commodities to and from those terminals. Given the number of terminals involved, it is inconceivable that the merger in question will not result in a reduction of competition on the water routes in question.

(App. D, 45a).

In reviewing the transaction under the Act, the ICC was first required to determine if CSX and ACL compete for traffic. The ICC necessarily answered that question in the affir-

mative: "CSX and [ACL] do actively compete for the same traffic for the same shippers." (App. E, 93a). The ICC then proceeded to determine whether the acquisition satisfied the narrow exception to the general prohibition against rail-barge mergers contained in the Act. That exception required that the railroad satisfy two stringent tests: first, that the acquisition of ownership "will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce"; and second, "that it will still allow competition, without reduction, on the water route in question." The ICC concluded "that, due to the highly competitive nature of the barge industry and the relative ease of entry associated with it, no reduction in competition will occur." (App. E, 52a).[7] In making that determination, the ICC for the first time in the history of the Act failed to analyze the overall reduction of rail-barge competition resulting from the merger and looked only to the impact of the acquisition on barge-barge competition.

Review was sought in the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 2342 (1982). On January 23, 1986, the Court of Appeals, in a two-to-one decision, affirmed the ICC's approval of the acquisition. The majority held that the Act was merely "meant to remedy a particular evil which frequently accompanied railroad acquisition of bargelines"— namely, the evil of predatory pricing (App. A, 7a). The majority recognized that if Congress intended to do more than simply remedy the evil of predatory pricing, it would be "difficult to interpret a narrow statutory exception to encompass a merger between companies the size of CSX and ACL." (*Id.*, 6a-7a, 10a). The majority proceeded, however, to do precisely that.

Having determined that the purpose of the Act was the narrow one of preventing predatory pricing, the majority then ruled that the ICC had properly construed the Act to require

[7] The ICC also found that the public interest test was satisfied but in so doing it erroneously attributed no independent substance to the requirement, indicating that in its view the public interest test "is closely related to the competition test." (App. E, 121a).

only analysis of harm to competition among barge lines and not to competition between barge lines and railroads (App. A, 13a). The majority also held that barge-barge competition would not be reduced unless the impact of the acquisition was to drive independent barge carriers completely out of business. (*Id.*, 8a, 14a).

Circuit Judge Timbers dissented:

> [I]n my view the ICC has erroneously interpreted and applied the Panama Canal Act, 49 U.S.C. § 11321 (1982) (the "Act"), so as to approve for the first time during the seventy-three year history of the Act the acquisition by a railroad of a bargeline. Today's decision by our Court is one of first impression among the courts of the United States, for no court has ever approved such an acquisition. The acquisition in question is one of enormous importance; it concerns the acquisition by the nation's second largest railroad (CSX Corporation) of American Commercial Lines, Inc. (ACL), which owns the nation's largest bargeline. In approving the acquisition, the ICC rejected and overruled its own prior controlling decisions.

(App. A, 32a). According to Judge Timbers, the "essential, and fatal, error upon which the ICC's decision is based, is its utter failure to consider the effect of this acquisition on competition between railroads and bargelines." (*Id.*, 33a). He characterized the ICC's failure to consider rail-barge competition as "curious" and "result oriented," and stated that the "ICC's convenient manipulation of the facts and the law to reach the result it did in the instant case strikes me as nothing short of astounding." (*Id.*, 33a, 35a).

A petition for rehearing with suggestion of rehearing *en banc* was denied by the Sixth Circuit in an order entered on March 28, 1986 (App. C, 43a). Circuit Judge Merritt, joined by Judges Keith, Martin, and Jones, issued a four-page dissenting opinion. Judge Merritt stated, *inter alia*, that:

> I believe that we should have granted rehearing en banc in this important antitrust case. Congress has enacted a law flatly prohibiting a merger between a railroad and a barge line if that merger results in *any* reduction in competition. Never before has a railroad been permitted to merge with a competing barge line, regardless of the political cast or regulatory philosophy of the Commission or the antitrust philosopy of the courts. Yet in this case the Interstate Commerce Commission has refused to look at what effect the merger of the largest railroad east of the Mississippi with the largest barge line in the nation will have on rail-barge competition, and at whether the lessening of rail-barge competition will lead to a lessening of competition among barge lines. As Judge Timbers correctly observes in his dissent, such refusal is an "abdication of responsibility on the part of the ICC" that "makes a mockery of its regulatory functions." Slip Op. at 40. We do not perform our judicial function when we uphold it.

(App. D, 44a-45a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision sustaining the acquisition of the nation's largest barge line by the nation's second largest railroad is, as Judge Timbers stated, "one of first impression among the courts of the United States" and concerns an acquisition "of enormous importance" (App. A, 32a). The approval of the CSX-ACL acquisition is significant not only because of its magnitude standing alone, but also because of what it portends. The Sixth Circuit effectively conceded that approval of this acquisition will "allow almost any rail-barge merger." (*Id.*, 10a). If permitted to stand, the decision will fundamentally alter the structure of surface transportation competition in the United States with profound economic and legal implications that Congress affirmatively sought to prohibit.

The economic impact of this case is national in scope. Surface transportation in the United States has been characterized in recent years by two notable events. First, successive rail mergers have left the nation with only three major railroads in the eastern United States, each basically serving separate regions of the country.[8] The result has been to curtail competition among railroads, and most shippers (over 85% in the case of coal) have become captive to a single railroad (*See* App. A, 37a). Second, Congress has removed rail ratemaking from close regulatory scrutiny and the railroads have obtained new freedom from rate regulation. As these developments have occurred, intermodal competition has become even more important, in lieu of regulation, to safeguard against railroad abuse of market power.

Independent barge transportation is the primary, and only direct, source of competition faced by rail carriers for the long haul of bulk commodities such as coal, grain, ores, and chemicals—vital raw materials that underpin the national economy. The competitive position of independent barge transportation has provided the public with a low cost alternative to rail service and, as a result, has stimulated rate competition, product innovation, and service efficiencies, all inuring to the benefit of shippers and the public which they ultimately serve.[9] As Judge Merritt observed in dissenting from the denial of rehearing *en banc*:

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[8] In contrast, in 1958, there were 57 Class I line haul railroads in the East. The same situation exists west of the Mississippi, where there are now only four primary railroads: the Burlington Northern, Union Pacific, Santa Fe and Southern Pacific. The proposed consolidation of the latter two railroads is now pending before the ICC.

[9] In the legislative history of the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980), Congress explicitly recognized these benefits from independent water carrier competition. The Senate Committee Report explained:

> Throughout the Interstate Commerce Act there are numerous provisions which illustrate prior congressional recognition of the importance of [the] rail-water competitive relationship. We believe that the benefit to the public of rail-water competition and coordination is hundreds of millions of dollars in freight rate savings which are passed through to the consumer. Moreover, pressures of competition improve the efficiency of both rail and water modes. . . . Practices which undermine such healthy competition are contrary to this congressional recognition.

S. Rep. No. 470, 96th Cong., 1st Sess. 30 (1979).

"In terms of its economic impact, this case is significant. Our decision will affect the price of coal, grain, and other commodities for many years in the Ohio and Tennessee Valleys and beyond." (App. D, 45a).

The legal implications of the Court of Appeals' decision are equally significant. This acquisition was approved by the ICC under the Panama Canal Act, a specialized antitrust statute embodying a basic policy generally prohibiting common ownership of competing rail and water carriers. Although the preservation of rail-barge competition is the focus of the Act, the Court of Appeals has ruled that the ICC need not consider the impact of a rail-barge consolidation on rail-barge competition. The Court of Appeals further ruled that in analyzing the impact of the acquisition on water carriers, the acquisition may be approved unless it will result in the complete destruction of other water carriers. The decision of the Court of Appeals is manifestly contrary to the purpose and language of the Act as it has been understood and applied by the ICC and the Courts in the seventy-four year history of the statute. Unless the decision is reversed, the intent of Congress will have been nullified and the ICC allowed to arrogate to itself the functions of the legislative branch.

Finally, the decision is contrary to the National Transportation Policy as it has evolved at the hand of Congress. 49 U.S.C. §§ 10101, 10101a (1982). Congress has redefined the National Transportation Policy from time to time, adopting differing statutory approaches to accomplish its objectives. However, although Congress has repeatedly revisited the matter, it has left the Panama Canal Act's general prohibition of common ownership of competing rail and water carriers unchanged. This has not been inadvertent. Thus, while Congress has moved to encourage rail-rail consolidations, it has repeatedly refused to change the Act and has consistently relied on the competition provided by the independent barge carriers as an important means of constraining railroad market power. Like-

wise, this Court and the ICC have recognized that independent barge competition was an important factor which has permitted the ICC to approve rail-rail consolidations. *Penn-Central Merger Cases*, 389 U.S. 486, 501 (1968); *CSX Corp.*, 363 I.C.C. 518, 568-69, 573 (1980). Furthermore, when Congress adopted the Staggers Act, it chose to rely on independent barge competition, in lieu of regulation, as a predicate for deregulating rail rate making. See pp. 22-23, *infra*.

This case presents important federal questions concerning the Act and its relationship to the National Transportation Policy which should be settled by the Court.[10]

I. The Court Of Appeals Erred In Ruling That The ICC Was Not Required To Consider The Impact Of The Acquisition On Rail-Barge Competition

A. The Court Of Appeals' Decision Is Contrary To The Language, Structure, And Purpose Of The Act

The Court of Appeals fundamentally misconstrued the Act by holding that the ICC was not required to consider the effect of the acquisition on rail-barge competition and could limit its analysis to competition among barge lines (App. A, 13a). The Court of Appeals' decision contradicts the language and internal logic of the statute, violates Congress' intent, and disregards the competitive realities inherent in this case.

Congress expressly prohibited railroad control and required railroad divestiture of water carriers with which the railroad

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[10] This is not the first time the Supreme Court has been asked to correct an ICC misconstruction of a statute designed to protect water carriers from anticompetitive and abusive practices by competing railroads. *E.g.*, *ICC* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56 (1956); *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd sub nom. State Corp. Comm'n* v. *Arrow Transportation Co.*, 361 U.S. 353 (1960). *See also* P. Mapes, *Competition Between Railroads and Water Carriers: A Comparison of the Regulatory and Antitrust Approaches and a Proposal for Reform*, 39 U. Pitt. L. Rev. 653, 764-77 (1978).

does or may compete for traffic, subject only to a narrowly defined exception. The Act is manifestly concerned with the structural objective of precluding common ownership. Unlike many trade regulation statutes, it does not purport to regulate specific anticompetitive practices; rather it is designed to prohibit the condition, *i.e.*, common ownership, in which such practices might thrive, and thereby to assure the benefits of competition between rail and water carriers.

The exception to the general prohibition of common ownership requires, *inter alia*, that the ICC find that the acquisition "will still allow competition, *without reduction*, on the water route in question." (Emphasis added). The Court of Appeals prefaced its construction of this provision by noting that "[b]arges, not trains, operate on water routes." (App. A, 13a). While descriptively accurate, this simplistic observation does not contribute to analysis of the question at hand. It disregards the fact that the Act is triggered by a finding of rail-barge competition, and that Congress was concerned with preserving competition between rail and water carriers for traffic moving along parallel routes. *See* H.R. Rep. No. 423, 62d Cong., 2d Sess. 12 (1912). It is illogical to conclude that Congress, motivated by a desire to preserve rail-water competition, and using the existence of such competition to trigger the statute, intended the ICC to then ignore such competition in deciding to approve or disapprove an acquisition between competing rail and water carriers.

The Act had its genesis in Congress' recognition that rail-barge competition had been destroyed as a result of common ownership. The opening of the Panama Canal presented the need for prompt legislative action. But Congress' concern was not limited to the Canal, and the Act was intentionally drafted to encompass coastwise and inland waterway traffic. *See* H.R.

No. 423, 62d Cong., 2d Sess. 12 (1912). The legislation did not occur in a vacuum. A pattern of railroads eliminating competition through acquisitions of water carriers had developed which Congress sought both to prohibit and to remedy. *See American Waterways Operators, Inc.* v. *United States*, 386 F.Supp. 799, 803 (D.D.C. 1974), *aff'd sub nom. Water Transport Ass'n* v. *United States*, 421 U.S. 1006 (1975).[11]

The Court of Appeals sought to buttress its ruling that the ICC could ignore rail-barge competition by holding, contrary to all prior understanding of the Act, that the Act was directed solely at the evil of predatory pricing by railroad-owned barge lines (App. A, 7a, 10a, 13a). This interpretation of the statutory purpose is manifestly incorrect; yet it is critical to the Court's decision because the majority in the Sixth Circuit conceded that if it had misconceived the purpose of the Act, it would be difficult to approve an acquisition of the magnitude of the one at bar (App. A, 6a-7a).

To be sure, Congress was aware of, and sought to prevent, several specific anticompetitive practices in which railroads had engaged, one of which was predatory pricing. Congress was aware of other anticompetitive practices as well: refusing

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[11] The House Report to the Panama Canal bill referred to the history of railroad abuse:

> The apprehension of railroad-owned vessels driving competition from the canal may or may not be exaggerated, but it is certain that the evil, which is only anticipated there, already exists in the coastwise trade on both coasts, as well as on our lakes and rivers. The evil is prevalent, recognized, and complained of. The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition. In answering demands for the exclusion of railroad-owned ships from the canal . . . the committee thinks it wise, just, and opportune to broaden the amendment so as to serve the higher, wider, more pressing, and more necessary purposes of excluding the railroads from operating vessels in competition with their tracks anywhere in the coastwise trade generally or in the lake [sic] and rivers.

H.R. Rep. No. 423, 62d Cong., 2d Sess. 12 (1912).

to grant independent water carriers access to railroad controlled docks or allowing access only upon payment of unreasonable fees; providing poor quality service when a shipper used an independent water carrier; steering traffic to the railroad controlled water carrier and away from independent water carriers; and entering into exclusive contracts with shippers to use only the railroad controlled water carrier. *See* 48 Cong. Rec. 6594-95, 6642, 6690, 6760-61, 6929, 10372-73, 10464-66, 10556-57, 10562, 10567 (1912); American Academy of Political and Social Science, *Government Regulation of Water Transportation*—The Annals Volume LV at App. II, 253-55 (E. Johnson, ed. 1914). The legislative history reflects the fact that railroads, using these various anticompetitive practices (not just predatory pricing) had driven water carriers off the waters across the country.

These practices, however, were manifestations of—and were made possible by—the underlying evil of common ownership. Congress' overriding purpose was to promote the independence of water transport competition in order to insure the benefits of rail-water competition to shippers and the public ultimately served. Arguments that common ownership was more efficient and thus should be permitted subject to ICC regulation (*e.g.*, 48 Cong. Rec. 9234, 10463, 10561-62 (1912)) were rejected because Congress determined that competition from independent water carriers would effectively constrain rail rates. For example, ICC Chairman Prouty, urging adoption of the Act, stated: "While the Interstate Commerce Commission might, if vested with authority, prevent to some extent the injurious effect of allowing a common ownership over these competing carriers, still the limitations under which we act are such that we do not believe we could secure the same favorable rates which would result from unrestrained competition." 48 Cong. Rec. 10463 (1912); *see also* 48 Cong. Rec. 9238 (1912) (Sen. Townsend: "Water transportation, if kept free . . . will reduce rail rates and keep them reasonable . . .").

The courts that have interpreted the Act have uniformly recognized the broad purpose underlying its enactment. The only other Court of Appeals to consider the congressional purpose was the District of Columbia Circuit in its decision approving the voting trust used by CSX to hold ACL stock pending ICC review under the Act. *Water Transport Association* v. *ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). The Court expressly held the Act was designed "to preserve rail-water competition by barring railroads from owning or controlling competing water carriers." *Id.* at 587. Other courts have similarly interpreted the congressional purpose, *American Waterways Operators, Inc.* v. *United States*, 386 F. Supp. 799, 803 (D.D.C. 1974), *aff'd sub. nom. Water Transport Ass'n* v. *United States*, 421 U.S. 1006 (1975), and have recognized the narrow scope of the Act's exception, *Lehigh Valley R. Co.* v. *United States*, 234 F. 682, 698-99 (E.D. Pa. 1916), *aff'd*, 243 U.S. 412 (1917). No court prior to the Sixth Circuit's decision in this case had held or even suggested that the sole purpose of the Act was merely to preclude predatory pricing or that the effect of the acquisition on rail-barge competition could be ignored in considering whether there had been a reduction in competition.

The Act is a specialized antitrust statute designed to preserve rail-barge competition by implementing the structural objective of generally prohibiting common ownership. Its focus on structure mirrors Section 7 of the Clayton Act, 15 U.S.C. § 18, passed in 1914, which governs mergers and acquisitions in the general economy. The Act, however, is more stringent than its Clayton Act analogue—the Act prohibits a rail-barge acquisition unless the railroad can establish that the acquisition will still allow competition "without reduction," while Section 7 of the Clayton Act prohibits only those acquisitions whose effect may be "substantially to lessen competition, or tend to create a monopoly."

Approval of the acquisition under the Act immunizes the transaction from antitrust scrutiny (App. A, 39a). Thus, the Sixth Circuit's decision upholding the ICC's sanction of the acquisition, and particularly its ruling that the ICC need not analyze rail-barge competition, means that the acquisition will never be subjected to an analysis of competition factors. The result is to create a gap in antitrust enforcement, contrary to Congress' unambiguous mandate.

B. The Court Of Appeals' Decision Is Contrary To The Established Interpretation And Application Of The Act

From the very beginning, the ICC has consistently held that the essential purpose of the Act is to promote unrestricted competition between railroads and water carriers serving a particular water route by ensuring that the water carriers existed under separate ownership free from railroad domination and control. *Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 699, 706, 710, 712-13 (1915) ("Congress has decreed that there shall be a restoration of conditions which prevailed when railroads had no interest in and exercised no control over the boat lines plying the country's water routes."), *aff'd sub nom. Lehigh Valley R. Co.* v. *United States*, 234 F. 682 (E.D. Pa. 1916), *aff'd*, 243 U.S. 412 (1917); *Nicholson Universal Steamship Co.*, 248 I.C.C. 43, 67 (1941) (the congressional purpose behind the Act is "to enforce a complete separation between railroads and competing water carriers"). The ICC's own precedents belie that the Act was directed solely at the evil of predatory pricing. *Missouri Pacific Railroad*, 245 I.C.C. 143, 148 (1941) (Act "directed primarily to interests by railroad companies in competing water lines, which was the evil to be brought under control. . . ."). Indeed, the ICC stated as recently as 1983, in an earlier decision involving this very acquisition, that the fundamental purpose behind the Act was to preserve rail-water competition:

> The debates . . . in the House and Senate also clearly demonstrate that Congress had in mind relationships potentially adversely affecting rail-water competition . . . . In sum, the test of whether an interest is prohibited . . . is whether the relationship enables the railroad to adversely affect competition from water carriers . . . .

Water Transport Association - Petition for Declaratory Order - American Commercial Lines Voting Trust, 367 I.C.C. 559, 565-66 (1983), *aff'd sub nom. Water Transport Association* v. *ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984).

Consistent with its recognition of the broad legislative purpose to preserve rail-water competition, the ICC has, until now, given the exception contained in the Act a properly narrow construction:

> For any case to be within the spirit of this proviso it is necessary to show a situation in which are present all the elements which prevail, or would prevail, were the water service independently operated. On a watercourse where the boats and boat lines are free from domination or control by the railroads, and where they are left to survive as their merit or the ingenuity of their owners makes possible, there will be, and always is, a healthy rivalry and striving between such boat lines themselves and with paralleling railroads for all suitable and available traffic. There is competition.

Lake Line, supra, 33 I.C.C. at 712. In *Lake Line*, the ICC required divestiture by the railroads of the captive water carriers because it found that under separate ownership the water carrier would "become a competitor of every other boat line and of every paralleling railroad for all traffic which moves . . . or

which might move over that route. . . ," *id.* at 715, a situation which could not exist under common ownership.[12]

The ICC reaffirmed its strict interpretation of the Act in *Illinois Central Railroad Co. — Control — John I. Hay Co.*, 317 I.C.C. 39 (1962). In that case, the ICC refused to approve the acquisition of a water carrier by two railroads because it found that competition would be reduced between the acquiring railroads and the water carrier, whose operations were substantially competitive to and parallel with the lines of the railroads (317 I.C.C. at 52):

> The question is whether the transaction would *eliminate, diminish, forestall, hinder, or frustrate competition on the route by water in any manner and to any material degree; as, for example: between Hay and the controlling rail carriers;* between Hay and the competing water carriers; or between the competitive water carriers. To decide this question in applicants' favor it would be necessary to conclude that Hay's competitive status under the control of the railroads would compare favorably with its present status as an independently operated water carrier. . . . However, such a finding cannot be made on this record and would be improbable in any event in view of the directly competitive nature of the water carrier operations of Hay and the rail operations of the rail-

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[12] The ICC, implementing the congressional mandate, see note 6 *supra*, specifically rejected arguments (1) that projected efficiencies and lower costs from joint ownership provided a basis for approving the continued ownership, and (2) that ICC oversight was a sufficient check to anticompetitive conduct normally resulting from joint ownership. *Id.* at 711, 714-15. In the case at bar, the ICC embraced these very arguments, and thus rejected the views of ICC members involved with the drafting and passage of the Act. *See American Waterways Operators, Inc.* v. *United States*, *supra*, 386 F. Supp. at 804 & n.14 (views of ICC administrators who participated in drafting of Panama Canal Act entitled to "higher significance" than current administration views.)

> road applicants. . . . The transaction would reduce competition between Hay and the railroads.

317 I.C.C. at 54 (emphasis added).[13]

The ICC in the present case expressly overruled its decision in *Hay* to the extent *Hay* required a finding that the water carrier's competitive status in relation to the acquiring railroad after acquisition would compare favorably with its competitive status as an independent carrier (App. E, 80a-81a). If the only import of the overruling of *Hay* were the rejection of a doctrine of automatic bar of acquisitions between competing carriers no matter how minimal the competition between them, it would be unremarkable. But it cannot justify refusing even to analyze the impact of the acquisition on rail-barge competition.

Congress intended to prohibit acquisitions between rail and barge lines unless they will not reduce competition to any material degree. The ICC has no authority to nullify that mandate. But that is what the ICC has done. Its decision does not at any point analyze the impact of the acquisition on competition between CSX and ACL, and the Sixth Circuit has held that it need not do so.

Plainly, under the ICC's prior and correct interpretation of the Act, the acquisition of ACL by CSX would have been disapproved. In order to approve that acquisition, the ICC would have been required to find that the rail-barge competition between CSX and ACL would not be diminished "to any material degree," a finding which even the Sixth Circuit majority agreed would be arbitrary and capricious (App. A, 5a n.2).[14]

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[13] In addition to finding there would be a reduction of competition between Hay and the acquiring railroads, the ICC also found that the alliance of Hay with two strong railroads would give Hay a "substantial" competitive advantage over independent water carriers that would ultimately reduce competition. *Id.* at 54-55.

[14] In the voting trust decision by the District of Columbia Circuit, Judge Greene in his dissenting opinion stated that CSX's acquisition of ACL must ultimately be disapproved by the ICC on the merits when examined under the Panama Canal Act, "unless the ICC should at that time again apply its own policy rather than the congressional view of the proper relationships in the rail-water market." *Water Transport Association* v. *ICC*, *supra*, 715 F.2d at 601 & n.25.

C. Congressional Action Concerning The Act Confirms The Error Of The Court Of Appeals

Congressional action since the passage of the Panama Canal Act has underscored its continued commitment to the preservation of vigorous competition between independent water carriers and the railroads. Since the inception of the Act railroads and the ICC itself have repeatedly sought to alter or even repeal the Act and on every occasion Congress has declined to do so. In 1939 and 1959 railroad efforts to repeal the Act were unsuccessful. H.R. 4862, 76th Cong., 1st Sess. (1939); S. 1355, 86th Cong., 1st Sess. (1959). And, as recently as 1978, the ICC's recommendation that the Act be repealed was not accepted by Congress. *See* 48 Fed. Reg. 59,608-09 (1978).[15]

In 1940, Congress reenacted the Panama Canal Act as part of the Transportation Act of 1940. No substantive changes were made in the statute. *Hay*, 317 I.C.C. at 51; *Missouri Pacific Railroad*, 245 I.C.C. 143, 147-48 (1941); 86 Cong. Rec. 11270, 11766 (1940). It is well settled that "[w]hen the statute giving rise to the longstanding interpretation has been re-enacted without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " *Federal Deposit Insurance Corp.* v. *Philadelphia Gear Corp.*, 54 U.S.L.W. 4525, 4528 (U.S. May 27, 1986), *quoting NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974). One court has specifically held that the effect of the

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[15] Efforts to weaken the Act began shortly after its passage and have continued. In 1916 the ICC requested that the Act be amended to permit acquisitions that might be deemed in the public interest. *See* 1916 ICC Ann. Rep. pp. 63, 65. Congress, however, took no action. In 1928 Congress reaffirmed its concern with independent competition between transportation modes by prohibiting the sale of the government owned and operated barge line to any rail carrier. Denison Act, Pub. L. No. 70-601, § 2, 47 Stat. 978, 979 (1928). In 1983, a bill to adopt a "public interest" standard in lieu of the prohibition and narrow exception failed to gain congressional support. S. 48, 98th Cong., 1st Sess. (1983).

reenactment of the Panama Canal Act in 1940 without pertinent change was to approve the ICC's longstanding interpretations of the Act and to give them the "effect of law." *American Waterways Operators, Inc.* v. *United States, supra*, 386 F. Supp. at 804 n.17. The confirmatory effect of this reenactment is especially great because Congress expressly referred to and approved the ICC's decision in *Lake Line* in the course of the 1940 reenactment. 86 Cong. Rec. 11766-67 (1940). *See Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 54 U.S.L.W. 4520, 4523 (U.S. May 27, 1986) (where legislative history of statute's reenactment reveals "clear congressional awareness" of existing interpretation, the fact Congress left the interpretation "undisturbed lends powerful support to [its] continued viability").

Finally, in 1980, when Congress passed the Staggers Rail Act deregulating the railroads, it recognized and reaffirmed the importance of preserving competition between rail and water carriers. *See* Pub. L. No. 96-448, §§ 101(a)(4), (5), 707, 94 Stat. 1897, 1965-66 (1980); S. Rep. No. 470, 96th Cong., 1st Sess. 30 (1979); H.R. Rep. No. 1035, 96th Cong., 2d Sess. 39 (1980); H. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 142-43 (1980). Moreover, in passing the Staggers Act, Congress expressly acknowledged the critical function of the Panama Canal Act: "[I]t prohibited railroads from owning water carriers in competition with rail routes. The Act successfully headed off transportation companies." H.R. Rep. No. 1035, 96th Cong., 2d Sess. 82 (1980). Congress obviously expected that water carriers would serve as an important check on the deregulated railroads and that the independence of those water carriers would be ensured by the Panama Canal Act. Indeed, the ICC itself has repeatedly recognized and relied on the constraint which water rates exert on rail rates to justify rail mergers and rate decisions, including the ICC's decision approving the railroad merger forming CSX. *CSX Corp.*, 363 I.C.C. 518, 569, 573 (1980); 49 C.F.R.

§ 1180.1(c)(2)(i) (1985); *Investigation of Railroad Freight Rate Structure—Grain and Grain Products*, 345 I.C.C. 2977, 3010, 3020 (1979). The ICC's decision in this case will have the inevitable effect of removing one of the cornerstones of deregulation and permitting formation of the very transportation companies Congress intended to prohibit.

D. The Court Of Appeals Disregarded The Competitive Realities And Ignored The Practical Implications Of Its Decision

The Court of Appeals simply disregarded the competitive realities in this case and was blind to the practical implications of its decision. Under the Act, approval of an acquisition is an exception to a general prohibition, but the Court of Appeals has transformed the exception into an open door. If the acquisition of the nation's largest barge line by the nation's second largest railroad, with which it can and does compete, can be approved, no acquisition will be denied, and the Sixth Circuit has essentially conceded that this is so (App. A, 10a). Common sense dictates that Congress did not intend this result, and analysis of the statute and legislative history demonstrates that it certainly did not. Unless this decision is reversed the Act will have been effectively repealed.[16]

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[16] Of the four Commissioners voting on the CSX/ACL transaction, two acknowledged their approval would effectively nullify the Act:

> *Chairman Taylor:* "This is about as tough a case as we could have, . . . the biggest eastern coal carrier in the rail business, [and] either [the] first or second [largest] . . . barge line, and the fact of the matter is that if we grant this one, I don't know how you deny any others. . . ." Open Conf. Tr. 59.
>
> *Commissioner Sterrett:* "If we grant this application, how do we breathe any vitality into the Panama Canal Act at all? . . . [R]eally, as of 11:20 this morning, any other applicant here would have to be granted as well, presumably." Open Conf. Tr. 58-59.

Commissioner Andre approved the acquisition because there was a "willing buyer and a willing seller" and the "urge to merge." Open Conf. Tr. 73.

II. The Court Of Appeals Erred In Ruling That Competition Would Not Be Reduced Unless Water Carriers Were Driven Completely Out Of Business.

Even assuming the Court of Appeals is correct in holding that the Act's exception is concerned only with barge-barge competition, the Court has fundamentally misconstrued the standard for assessing the impact of an acquisition on that competition. The Court of Appeals held that a railroad acquisition of a competing water carrier does not reduce competition within the meaning of the Act so long as its effect is not "to drive other bargelines completely out of the market." (App. A, 14a). The Court has adopted, in effect, a standard keyed to a destruction of the independent barge competitors of ACL. Such a standard is patently inconsistent with the language of the Act and is erroneous as a matter of law.

In order to approve an acquisition under the Act, the ICC must find that it "will still allow competition, *without reduction*, on the water route in question." (Emphasis added). As the ICC itself has conceded, the standard is a stringent one. *Any* lessening of competition invalidates the acquisition (App. E, 77a). The Court of Appeals has effectively substituted the word "destruction" for "reduction" in the language of the Act's exception. This interpretation of the Act simply cannot be sustained on any basis.

CONCLUSION

The case presents important questions concerning the Act which should be settled by this Court. If the Sixth Circuit's decision is allowed to stand, the Act will have been effectively repealed by the ICC, acting in direct contravention of Congress' intent to preserve rail-barge competition. Unless this Court intervenes, the nature of this country's surface transportation industry will be fundamentally and irrevocably altered. The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 26, 1986

CSX AND ACBL SYSTEMS SERVING MAJOR PORTS

WATERBORNE COMMERCE 1981

100 MILLION SHORT TONS
50
25
10
5
1

ACBL
CSX

0 50 100 150 200 250
MILES

Chicago 50
Cincinnati 15.1
Huntington 18.6
Pittsburgh 32.3
St. Louis 22.7
Evansville
Louisville 7.8
Nashville 2
Knoxville .3
Chattanooga 2.5
Memphis 11.4
Mobile 37.6
Pascagoula 26.4
Biloxi 1.2
Gulfport 1.1
New Orleans 188.9
Tampa 45

MINNESOTA
SOUTH DAKOTA
WISCONSIN
MICHIGAN
NEW YORK
VT.
IOWA
NEBRASKA
ILLINOIS
INDIANA
OHIO
PENNSYLVANIA
NEW JERSEY
MARYLAND
DELAWARE
WEST VIRGINIA
VIRGINIA
KANSAS
MISSOURI
KENTUCKY
TENNESSEE
NORTH CAROLINA
SOUTH CAROLINA
ARKANSAS
OKLAHOMA
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Lincoln
Peoria
Springfield
Topeka
Kansas City
Columbia
Jefferson City
Wichita
Tulsa
Oklahoma City
Ft Smith
Little Rock
Pine Bluff
Fort Worth
Dallas
Shreveport
Monroe
Jackson
Alexandria
Austin
Beaumont
L Charles
Lafayette
Houston
Victoria
Corpus Christi
Brownsville
Grand Rapids
Flint
Lansing
Detroit
Erie
Toledo
Cleveland
Akron
Canton
Youngstown
Steubenville
Wheeling
Columbus
Dayton
Indianapolis
Cincinnati
Parkersburg
Charleston
Ft. Wayne
South Bend
Gary
Evansville
Owensboro
Hopkinsville
Frankfort
Lexington
Louisville
Nashville
Knoxville
Chattanooga
Florence
Huntsville
Memphis
Birmingham
Tuscaloosa
Atlanta
Macon
Columbus
Montgomery
Savannah
Pensacola
Panama City
Tallahassee
Jacksonville
Baton Rouge
New Orleans
Biloxi
Gulfport
Mobile
Tampa
St Petersburg
Ft Lauderdale
Hollywood
Miami
Niagara Falls
Rochester
Syracuse
Albany
Scranton
Hartford
Stamford
Yonkers
Paterson
Newark
New York
Allentown
Harrisburg
Trenton
Reading
Camden
Dover
Annapolis
Washington
Alexandria
Baltimore
Richmond
Newport News
Norfolk
Portsmouth
Winston-Salem
Greensboro
Raleigh
Charlotte
Columbia
Savannah
Jacksonville
Ohio River
Kanawha R.
Monongahela River
Kentucky R.
Green R.
Cumberland R.
Tennessee River
Arkansas River
White R.
Mississippi River
Yazoo River
Tombigbee R.
Alabama R.
Black Warrior
Chattahoochee R.
Ouachita R.
Red R.
Illinois River
Missouri
Lake Erie
Lake Michigan
Lake Ontario